FILED
JUN 5 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

NO. 77

JOHN W. LEWIS, PETITIONER,

vs.

PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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14 (A-47828-40)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

NO. 1036

JOHN W. LEWIS, PETITIONER,

vs.

PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

The one issue presented in this Petition for Certiorari is whether a defendant is deprived of due process of law when he is found guilty of manslaughter on an indictment charging him with murder. The questions raised here are the same questions raised in the Supreme

Court of Illinois; that is, that defendant had been denied due process of law because the indictment did not specifically charge him with manslaughter.

Petitioner says that the Supreme Court of the United States has jurisdiction herein because he raised a constitutional question or, to put it more concretely, he says this court should take jurisdiction because he alleges that when he was found guilty of manslaughter on an indictment charging murder he was so deprived of due process of law that the United States Supreme Court should take jurisdiction of this cause by certiorari and, we assume, reverse the same because petitioner had been convicted of an offense without being charged therewith and of which he had no notice.

Of course this court has jurisdiction to review cases where the constitutional rights of a person have been infringed, but the whole question turns, as we have said, on whether the conviction of petitioner for manslaughter under a charge of murder infringes any right or denied him any due process of law.

It is noteworthy that the evidence upon which petitioner was convicted is not preserved in the record, and we venture to ask whether, under the indictment for murder, if the evidence showed defendant did the alleged killing in such heat of passion or under such provocation

as to reduce the offense from murder to manslaughter, the court would not have the right to find him guilty of manslaughter under the charge of murder.

In his argument, petitioner overlooks the fact that the essential thing in the indictment was the charge of a killing. It not only charged the killing but charged malice, which was an aggravated form of killing, so to speak. The indictment not only charged killing with malice but, under the authorities, charged a killing and various assaults. The main question is when the petitioner was charged in the indictment with murder whether he was informed as to the finding which might ultimately be made against him. He knew that he was charged with an assault and the slaying in question. How the slaying occurred was developed from the evidence. Undoubtedly he made his defense and gave his version as to how the slaying occurred. On the whole evidence the court found that the slaying amounted to manslaughter and not to murder.

Under all the holdings in Illinois, where a defendant is charged with murder he may be found guilty of manslaughter on the theory that we just set forth that the killing is the principal thing and that the evidence having developed the manner of killing, the court or jury should find accordingly. In *People v. Dugas,* 310 Ill.

291, at pages 299, 300, this question is discussed at some length. The Supreme Court of Illinois there said:

> "It is a general rule of the criminal law that it is sufficient to prove so much of an indictment as shows that the defendant has committed a substantive crime therein specified. (1 Chitty on Crim. Law, 250). So, where the offense charged in an indictment includes within it another offense of lower degree the defendant may be convicted of a lower offense, even though the evidence fails as to the offense of higher degree. (1st Bishop's New Crim. Law, Sec. 780; 1st Roscoe on Crim. Ev. 8th ed., 123; *Stewart* v. *State,* 5 Ohio, 145.) *Under an indictment for murder a defendant may be found guilty of manslaughter,* and the verdict is not only the conviction of manslaughter but an acquittal of the charge of murder. (*Brennan* v. *People,* 15 Ill. 511.) The general rule that when an indictment for a higher crime embraces all the elements of an offense of an inferior degree, the jury may discharge the accused of the higher crime and convict him of the lower if the evidence justifies it, finds illustration in many cases." Citing *Earl* v. *People,* 73 Ill. 329; *Howard* v. *People,* 185 Ill. 552; *Watson* v. *State,* 116 Ga. 607; *Davis* v. *State,* 39 Md. 355; *State* v. *Finney,* 13 Ida. 307.

And then the Supreme Court points out how many other offenses the defendant might be convicted of as lesser offenses under a charge of murder and cites, further,

Letcher v. *State,* 145 Ala. 669;

Thomas v. *State,* 124 Ga. 331;

State v. O'Kane, 23 Kas. 244;

Busch v. *Commonwealth,* 78 Ky. 268;

Bean v. *State*, 25 Tex. App. 346;
State v. *Scott*, 24 Vt. 127;
Commonwealth v. *Drum*, 19 Pick 479.

Petitioner intimates that common law does not prevail in Illinois. The Supreme Court of Illinois, in its opinion, disposes of this contention and points out, at page 10 of petitioner's transcript of the record that the State of Illinois has adopted the common law of England so far as it is applicable and of a general nature and that it shall be considered as in full force until repealed by legislative authority; and also that the Illinois Revised Statutes of 1939, Chap. 38, par.736, provides that all trials for criminal offenses shall be conducted according to the course of common law except when this act points out a different mode. And the rules of evidence of the common law shall also be binding upon all courts and juries in criminal cases except as otherwise provided by law.

There is also cited in the opinion of the Supreme Court of Illinois, 26 Am. Jur. (Homicide) Sec. 572, wherein the question of conviction for manslaughter under an indictment charging murder is discussed and conclusion is against the contention of petitioners herein.

We submit that the assertion on the part of the petitioner that the questions raised were substantial does

not in any wise aid to their substantiality. As is shown by the citations of authority, it has been almost universally held that under an indictment for murder a defendant might be found guilty of manslaughter or of lesser kindred offenses.

Petitioner himself admits that he himself might insist on being found guilty of a lesser offense; that is to say, on a charge of murder he might insist on being found guilty of manslaughter but that without his insistence this could not be done. And we assume he means it could not be done even if the evidence justified doing it. We do not deem it necessary to argue that defendant, by this contention, does away with the entire case he attempts to make in his Petition for Certiorari. In other words, if he himself may, under a murder indictment, insist on being found guilty of manslaughter, then, if the evidence justified it, the only logical conclusion from this would be that the State would have the same right. But the People need not resort to this argument to justify their position since it is in the foundation of the law that, as we have heretofore said, the killing is the principal thing; the manner in which the killing occurred, whether it amounted to murder or manslaughter or self-defense is a question of evidence for the jury or the court to pass upon.

From the above it is clearly seen that no discrimination of any kind was exercised against defendant in the court below and that he had due process of law at every step of the procedure against him.

For the reasons above given, it is respectfully submitted that the Petition for Certiorari should be denied.

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